SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 71

MINE SAFETY APPLIANCES COMPANY,
Appellant,

vs.

JAMES V. FORRESTAL,
Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLANT

W. DENNING STEWART,
MAHLON E. LEWIS,
HOWARD ZACHARIAS,
CHARLES EFFINGER SMOOT,
Counsel for Appellant.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

OTHER AUTHORITIES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 71

MINE SAFETY APPLIANCES COMPANY,

Appellant,

vs.

JAMES V. FORRESTAL,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLANT

Opinion of the Court Below

The opinion of the Court below is reported in 59 Federal Supplement 733 and appears in the record at R. 54-62.

Jurisdictional Grounds

The statute authorizing appeal to this Court, in the case at bar, is the Act of Congress of August 24, 1937, 28 U. S. C. 380(a), 50 Stat. 751, Section 3. Jurisdiction was so recog-

nized by this Court in *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Company*, 313 U. S. 508 (1941); *Coffman* v. *Breeze Corporation*, 323 U. S. 325 (1945), and by analogy in *Sterling* v. *Constantin*, 287 U. S. 378 (1932) and *Hérkness* v. *Irion*, 278 U. S. 92 (1928).

The Order of Dismissal in the Court below was entered April 9, 1945 (R. 63). Application for appeal was filed May 1, 1945 (R. 64) and allowed the same day (R. 67). The case was docketed in this Court May 12, 1945 (R. 72).

The Statute Involved

The statute of the United States, the application of which is here involved is Section 403 of the Act of April 28, 1942, as amended October 21, 1942, July 1, 1943, and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Title 50, Appendix 1191), said statute is now known as the 1942 Renegotiation Act; and Section 403(a)(4)(C); (a)(4)(D); (e); (i)(1)(C); (i)(1)(D); (i)(1)(F) and (i)(3) as amended by Section 701(b) of the Act of February 25, 1944 (58 Stat. 78-92), now known as the 1943 Renegotiation Act. (Note: The 1943 Renegotiation Act—without the so-called 1942 Renegotiation Act—is now printed in the United States Code Annotated, but the "1943" Act is not pertinent to this case except for the subsections indicated above.) The material provisions of the statutes are set forth in the Appendix *infra*, pp. 39-47.

For the convenience of the Court, we present an outline of the material provisions of the statute.

This statute, originally enacted April 28, 1942, has several times been amended. As originally enacted, 56 Stat. 226, 245, Section 403(a) the statute was made applicable only to contracts and subcontracts of the War and Navy Depart-

ments and the Maritime Commission. Other agencies have been added by subsequent amendments, but the scheme of the statute with respect to renegotiation remains essentially the same.

The terms "renegotiate" and "Renegotiation" are defined by Subsection 403(a) of the statute as including—

> "the refixing by the Secretary of the Department of the contract price."

Here, appellee purported to act under Subsection (c) of the statute, which in part provided originally:

> "The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor."

The statute was expressly made applicable (Subsection (c)):

> "to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act."

The power so given to the Secretary, the statute provided (Subsection (f)):

> "* * * may be delegated, in whole or in part, by him to such individuals or agencies in such Departments as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

The statute was amended October 21, 1942, 56 Stat. 798, 982, Section 801 within the period here in controversy, so as to add the Treasury Department to the renegotiating agencies. The other amendments made then so far as here material, all of which were declared to be retroactively "effective as of April 28, 1942", are:

1. The statute for the first time undertook to define "excessive profits", but in legal effect added nothing to the statute because it merely said "'excessive profits' means * * * excessive profits." The language is:

> "'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." (Subsection 403(a)(4).)

2. The statute for the first time attempted a definition of a subcontract. The original Act mentioned, but did not in any way disclose what was to be embraced within subcontracts. The October 1942 amendment defined "subcontract" to mean:

> "any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property." (Subsection 403(a)(5).)

3. The statute authorized the Secretary "when the contractor or subcontractor holds two or more contracts or subcontracts," to:

> "renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract." (Subsection 403(c)(1).)

4. The statute authorized the Secretary to make his determination effective by, among other methods:

> "directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract,"

or by any combination of the several methods mentioned in the statute.

The statute was amended a second time on July 1, 1943, 57 Stat. 347, 348. The only change made was to add to the Renegotiation Act, contracts and subcontracts of:

> Defense Plant Corporation
> Metals Reserve Company
> Defense Supplies Corporation
> Rubber Reserve Company

The third amendment was made July 14, 1943, 57 Stat. 564. It merely added to the contracts subject to renegotiation, the so-called war brokers' contracts "under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder * * *." This amendment is of no moment here.

The fourth amendment is that made by the Revenue Act of 1943, which became effective February 25, 1944, 58 Stat. 78-92.

The only portion of the 1944 amendments which it will be necessary to consider in this case is Section 403 (e), which undertakes to provide for redetermination in the Tax Court of an asserted renegotiation liability. Subsection 403(e)(2) provides that one:

> "aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943 [that is to say, prior to February 25, 1944], with respect to a fiscal year ending before July 1, 1943,"

"may" file a petition with the Tax Court "for a redetermination thereof." This privilege is subject to the provisions of Section 403 (e)(1) including the following:

> "Upon such filing, such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits, received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The Court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board."

Statement

The case at bar is a suit against appellee individually and not in his official capacity (R. 1), and was heard below by a Three-Judge Court (Justices Miller, Bailey and McGuire) constituted under the Act of August 24, 1937, 50 Stat. 751, Section 3, 28 U. S. C. 380(a) (R. 35), the principal questions raised by the complaint (R. 1-17) being the unconstitutionality of the 1942 Renegotiation Statute hereinbefore mentioned from both a substantive and procedural standpoint, the illegality of the unilateral order, and

whether appellee had exceeded his statutory authority, and was therefore acting illegally. The complaint alleged facts entitling appellant to injunctive and declaratory judgment relief. Complainant's business for the fiscal years 1941 and 1942 was the subject of appellee's unilateral order (R. 6) and contracts entered into in the years 1940, 1941 and 1942 are here involved (R. 9).

Under protest (Complaint, paragraph 26; R. 11), appellant submitted to the procedure required by the Renegotiation Act with the result that on March 4, 1944, the appellee, purporting to act by delegation of authority to him, on behalf of the various other governmental departments (War, Treasury and Maritime Commission) interested in contracts with appellant (R. 2) notified it in writing as follows (R. 5-6):

"The Under Secretary of the Navy
Washington

March 4, 1944

Mine Safety Appliances Company, Pittsburgh, Pennsylvania.

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

GENTLEMEN:

Renegotiation with respect to your contracts and subcontracts within the meaning of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, has been conducted between you and the Secretary of the Navy or his duly authorized representative or representatives. In connection with such renegotiation there were submitted by

you or obtained from governmental or other reliable sources certain financial, operating and other data relating to your circumstances and operations and to the profits realized by you during your fiscal years ending December 31, 1941 and December 31, 1942, under such contracts and subcontracts. You have been afforded full opportunity, at hearings of which due notice was given and which you attended, to submit such additional information and to present such contentions as you deemed material to a determination whether any, and if so, what part, of such profits is excessive.

Due consideration has been given to all of such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all applicable factors pertinent to a determination of the existence and amount of excessive profits realized by you under such contracts and subcontracts for such periods. Such renegotiation has now been concluded and you have declined to enter into an agreement for the elimination of excessive profits realized during such periods from such contracts and subcontracts.

Accordingly, pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any refund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an

expense by Mine Safety Appliances Company for such periods, to the intent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods.

Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403.

Very truly yours, (S.) James Forrestal."

Appellant refused to submit to appellee's unilateral order and in order to prevent him from inflicting irreparable injury on it through the carrying out of his alleged illegal unilateral order and his threat to direct the withholding of amounts otherwise due appellant by the United States as contractor or subcontractor (which, under Subsection 403(2)(v) of the statute, he is required to turn into the Treasury), (Complaint paragraphs 30-34, R. 14-15), and as well due it from appellant's numerous contractors throughout the United States and to prevent appellee from injuriously interfering with the business relations between appellant and its numerous customers, and to avoid a multiplicity of suits throughout the United States which would necessarily be required if its subcontractors refused to pay, appellant averring that it was without a plain, adequate and complete remedy at law (Complaint paragraph 34, R. 14) filed its complaint (R. 1-17) in the Court below on March 8, 1944, praying for a preliminary injunction to be made permanent on final hearing and for a declaratory judgment (R. 16-17).

The complaint alleged facts establishing the unconstitutionality of the statute in question (R. 5-6, 8-15), and further alleged legal grounds establishing the unconstitutionality of said statute and the invalidity of appellee's unilateral order (R. 11-13). See footnote. Appellant further alleged facts (R. 9-10) which established that appellee was acting in excess of his statutory authority in that he had included in renegotiable business of appellant, contracts which had been entered into, completed, and paid for, prior to the date of the statute and its amendments and which, by its express language, were not subject thereto. Contracts paid for in full prior to April 28, 1942, are not subject to the statute (Sec. 403 (c) (6)).

The contracts here involved were, in substantial part, entered into in 1940, 1941, and 1942, prior to April 28, 1942, the date of the statute, and the amendments of October 21, 1942 and July 14, 1943. (Complaint, paragraphs 22 and 24; R. 9-10).

The grounds upon which unconstitutionality of the statute rest are, inter alia,

(a) The statute vests in appointed executive and administrative officials authority to repudiate prior existing contracts between appellant and the United States and others, and to pay for property acquired from appellant under such contracts, such prices therefor as in the opinion of these executive or administrative officers should be paid, the position of appellant being that since the Fifth Amendment guarantees due process and payment of just compensation such a statute is a violation thereof.

(b) The statute authorizes by its retroactive provision, and the complaint alleges, the repudiation of prior valid existing contracts between appellant and the United States, in violation of the Fifth Amendment.

(c) The statute delegates to appointed executive and administrative officials and permits them in turn to redelegate ad infinitum unrestricted legislative and judicial functions without standards of any nature and therefore violates Article I, Section 1; Article I, Section 8, Clause 18; and Article III, Section 1, of the Constitution of the United States, and

(d) The statute in legal effect delegates to appointed executive and administrative officials the authority to impose a super excess profits tax on such persons as in their unrestrained opinions should pay such tax and in such amounts as in their unrestrained opinions should be paid, in violation of said provisions.

On March 9, 1944, after the complaint had been served, the parties entered into the following stipulation (R. 17-18):

"Stipulation Suspending Payment and Intermediate Action

It is hereby stipulated by and between plaintiff above-named and defendants above-named by their counsel duly authorized thereto as follows:

1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

(e) The statute undertakes to vest in biased executive agencies with whom appellant made its contracts, the right to repudiate those contracts and fix a price for appellant's property, which action violates the "due process" clause of the Fifth Amendment of the Constitution of the United States in that it makes it impossible for appellant to receive a fair hearing or the rudimentary right of fair play from an independent and impartial administrative agency.

(f) The statute undertakes to discriminate, without any reasonable basis therefor, against excessive profits from contracts with certain government agencies and authorizes the granting of such exemptions therefrom as the appellee and his delegates, in their opinion, may see fit.

(g) The statute lacks due process and is unconstitutional from a procedural standpoint.

(h) The statute is, by its terms, arbitrary and discriminatory.

The complaint further alleged that the statute was unconstitutionally applied on the basis of the following facts as averred in the complaint:

(i) In arriving at his unilateral order of March 4, 1944, facts were considered by appellee which were obtained from "governmental or other reliable sources" and appellant was never apprised of these facts although request was made for such information. (Par. 21: R. 8-9.)

(j) No facts were found to support the unilateral order, and in fact appellant was refused information as to how the appellee and his board arrived at their conclusions. (Par. 21: R. 9.)

up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights.

MILLS AND KILPATRICK,

By [S.] CHARLES EFFINGER SMOOT,
[S.] W. DENNING STEWART,
Counsel for Plaintiff.
[S.] FRANCIS M. SHEA,
Asst. Atty. Gen.,
Counsel for Defendants.
3/9/44."

On June 12, 1944, the appellee filed his answer raising numerous issues of fact (R. 18-34).

On December 8, 1944, appellee filed a motion to dismiss (R. 41) asserting—

> "1. The Court lacks jurisdiction over the subject matter of the action; and
>
> 2. The complaint fails to state a claim against the defendant upon which relief can be granted."

In the alternative, appellee moved for summary judgment and offered the verified answer and an affidavit in support of both motions (R. 41). The substance of the affidavit (R. 41-49) is that since appellee says he need not look any further than the unpaid vouchers payable to appellant on which payment has been suspended, he neither will nor can proceed to collect, by withholding or otherwise, any further sum from appellant on account of excessive profits realized during its fiscal years 1941 and 1942. Appellant filed an answering affidavit denying certain of the averments (R. 45) of appellee's affidavit (R. 49-54).

The court below, upon consideration of the complaint, answer, and affidavits (R. 63), without passing upon the constitutional issue or whether appellee was acting in excess of his statutory authority, and disregarding the prayer for declaratory judgment, sustained one ground asserted in appellee's Motion to Dismiss, namely, that the Court lacked jurisdiction over the subject matter, the Court stating among other things that the United States was a necessary party because the effect of an injunction would be to require payment to appellant of the amounts due it on its contracts with the United States out of the Treasury and thus, in effect, compel specific performance on the part of the Government of its contracts (R. 61). Two opinions were filed (R. 54-62). Mr. Justice Miller concurred in the opinion of Mr. Justice McGuire (R. 54-62). Mr. Justice

Bailey filed a separate opinion in which the other two Justices concurred (R. 62).

Specification of Errors

Appellant relies on all errors asserted in its Assignment of Errors (R. 64-66) and Statement of Points to be Relied Upon (R. 68-70), but in view of the order of this Court of June 11, 1945 noting probable jurisdiction (R. 71-72), restricting argument to the points there designated, appellant understands that it is not permitted to argue any other errors contained in its Assignment of Errors. Assignment of Errors 1 and 14-16 and Points 1 and 9-17 (R. 64-66 and 69-70) raise the points permitted by the order of this Court.

ARGUMENT

Preliminary Statement

This Court by its order (R. 71-72) has restricted the argument in this case to these points:

1. Whether this is a suit against the United States.
2. Whether the complaint states a cause of action in equity.
3. This Court has also afforded counsel the privilege of arguing the legal significance of appellant's failure to proceed before the Tax Court as provided in Section 403 (e) of the Renegotiation Act of 1942 as amended.

We understand the constitutional issues are not to be argued, but that the statute here in question is to be assumed to be unconstitutional for the purpose of this argument.

I

The Case At Bar Is Ruled by Rickert Rice Mills v. Fontenot, 297 U. S. 110 (Rehearing Denied, 297 U. S. 726)

Upon the assumption that the Renegotiation Act of 1942, as amended, is unconstitutional, it logically and necessarily follows, we submit, that the unilateral order of appellee is

void and that appellant owes nothing and hence has no obligation to proceed in any other forum to establish that fact. Likewise, it being beyond dispute that appellant has refused to pay the sum demanded by appellee (R. 43), there is no reason for appellant to bring an action in any other forum to recover that which it has not paid.

It is submitted that since appellant has not paid the sum demanded by appellee (R. 43), and since its vouchers are held under the stipulation which merely suspends payment thereof (R. 17-18), the ruling of this Court in *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110 (rehearing denied 297 U. S. 726 (1936)), is conclusive of all questions now before this Court. There, the opinion disclosing the facts, this Court held at p. 112:

> "The petitioner, a processor of rice, filed its bill in the District Court for Eastern Louisiana, to restrain the respondent from assessing or collecting taxes • • • The bill charges the exaction is unconstitutional and alleges the respondent threatens collection by distraint, which will cause irreparable injury, as the petitioner has no adequate remedy at law to recover what may be collected. A preliminary injunction was sought. The respondent filed a motion to dismiss, citing Revised Statutes § 3224, and § 21 (a) of the amended Agricultural Adjustment Act as prohibiting restraint of collection, and also asserting that the petitioner had a plain, adequate, and complete remedy at law. • • •
>
> "In praying a writ of certiorari the petitioner asserted that by reason of the provisions of § 21 (d) it would be impossible to recover taxes collected, even though the act were unconstitutional, since the section forbids recovery except upon a showing of facts not susceptible of proof. This court granted the writ and restrained collection of the tax upon condition that the petitioner should pay the amount of the accruing taxes to a depository, to the joint credit of petitioner and respondent, such funds to be withdrawn only upon the further order of the court. • • •

"The changes made by the amendatory act of August 24, 1935, do not cure the infirmities of the original act which were the basis of decision in United States v. Butler, [297 U. S. 1,] ante, p. 1. The exaction still lacks the quality of a true tax. It remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress.

"We have no occasion to discuss or decide whether § 21 (d) affords an adequate remedy at law. As yet the petitioner has not paid the taxes to the respondent, and, in view of the decision in the *Butler* case, hereafter cannot be required so to do. If the respondent should now attempt to collect the tax by distraint he would be a trespasser. The decree of the District Court will be vacated, an appropriate order entered directing the repayment to the petitioner of the funds impounded *pendente lite*, and the cause remanded to the District Court for the entry of a decree enjoining collection of the assailed exaction. * * *"

"Decree vacated."

In *United States* v. *Kansas Flour Mills Corp.*, 314 U. S. 212 (1941), this Court, relying on *Ricket Rice Mills* v. *Fontenot, supra*, said at p. 218:

"It is true that after that decision [U. S. v. Butler, 297 U. S. 1] a taxpayer's right to an injunction against the collection of the tax was clear."

II

This Is Not a Suit Against the United States

The principle of law announced in *Ex parte Young*, 209 U. S. 123, is controlling here. At page 159 this Court said—

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of

the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

In cases of this type the question is always present of the validity of the action of the defendant. The defense is ex necessitate a valid statute or a showing that the complained-of action is within the scope of the statutory authority: *United States* v. *Lee*, 106 U. S. 196 (1882); *Poindexter* v. *Greenhow*, 114 U. S. 270 (1885); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (1891); *Tindal* v. *Wesley*, 167 U. S. 204 (1897); *Scranton* v. *Wheeler*, 179 U. S. 141 (1900); *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28 (1901); *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944); *Smith* v. *Jackson*, 246 U. S. 388 (1918), affirming 241 Fed. 747; *Miguel* v. *McCarl*, 291 U. S. 442 (1934). Action outside statutory authority is arbitrary in the proper sense of that term: *Adams* v. *Nagle*, 303 U. S. 532 (1938), and is a trespass: *Philadelphia Company* v. *Stimson*, 223 U. S. 605 (1912); *Waite* v. *Macy*, 246 U. S. 606 (1918); *Oklahoma ex rel., etc., Phillips* v. *Guy F. Atkinson Co.*, 37 Fed. Supp. 93 (1941), affirmed 313 U. S. 508 (1941).

To hold, as the lower Court held that without regard to whether the statute was unconstitutional or whether appellee was exceeding his statutory authority, the proceeding was in effect one against the United States, is to hold that appellant's property may be confiscated. The United States acquired appellant's property (material sold) by solemn contracts by which it agreed to pay therefor, but now through the device of passing a subsequent statute, although

it be unconstitutional, this Court is urged to hold that in effect the United States may repudiate those contracts and appellee may be authorized to withhold amounts otherwise due appellant on these and other contracts and appellant is helpless. Here the language of *United States* v. *Lee*, 106 U. S. 196, at p. 221, is quite appropriate. There this Court said:

> "It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court: Stop here; I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function; though the United States is no party to the suit; though one of the three great branches of the Government, to which by the Constitution this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.
>
> "The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the Government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations."

When appellant attempts to prevent appellee's unlawful procedure by appealing to equity to enjoin, the appellee answers that he personally has no interest, that what he is doing is on behalf of the United States and that to prevent him from illegally seizing amounts otherwise due appellant on its lawful contracts is, in effect, taking money

out of the Treasury of the United States. Appellant is not asking any relief which will require this Court to produce one cent for it. Appellant is not asking that appellee, or the United States, be required to affirmatively do anything, *Ickes* v. *Fox*, 300 U. S. 82 (1937). Appellant seeks to prevent appellee from withholding or seizing its property, i.e., amounts otherwise due it, wherever situated, under an allegedly unconstitutional statute and by action beyond his statutory authority, if the statute be constitutional. As was well said by this Court in *Goltra* v. *Weeks*, 271 U. S. 536 (1926) at p. 544:

> "By reason of their illegality, their acts (of government officers) or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government."

And again in *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636, at 644:

> "But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit."

The Court is not being asked to require Congress to appropriate funds because the record shows vouchers payable to appellant from funds already appropriated, have been issued and are in the hands of appellee as security (R. 17; 27-28, 44-46, 48-49). Prima facie these vouchers evidence an indebtedness due appellant from the United States—*Salomon* v. *United States*, 19 Wall. 17 (1873); *Countryman* v. *United States*, 21 *Court Claims* 474 (1866).

We also submit that appellee, by stipulating (R. 17; par. 1) that appellant should pledge its vouchers as security for whatever liability (if any) is finally determined to be due by a Court of last resort, thereby acknowledged ownership of the vouchers to be in appellant because appellant

could not pledge that which it did not own. It should also be noted that the stipulation expressly reserves the substantive rights of both parties (R. 18).

The important qualification of the stipulation is that appellant's vouchers are pledged as security only and to be used in payment only as the result of a determination of liability in whole or in part *by a Court of last resort* (R. 17-18).

In other words, appellee cannot look to these vouchers or the funds due thereon, unless a Court of last resort so decides. If that Court holds that appellee's unilateral order is void, we assume he will abide by that judgment and not interfere with whatever further action might be in order in regard to the vouchers. If appellee refuses, mandamus or injunction would lie: *Smith* v. *Jackson*, 241 Fed. 747, Affirmed, 246 U. S. 388; *Miguel* v. *McCarl*, 291 U. S. 422 (1934); *Richmond, F. & P. R. Co.* v. *McCarl*, (App. D. C.) 62 F. (2d) 203 (1932), Cert. Den. 288 U. S. 615 (1933). In the last cited case, which is applicable here, the Court said at p. 207:

> "The purpose of suit was not to challenge the discretion of the Comptroller General, but rather to challenge his authority to withhold a sum of money admitted to be due and payable. In such a case it is not necessary to join the United States."

Without regard to the stipulation, it is difficult to follow the reasoning which leads to the result that this suit is one in effect against the United States if the statute be unconstitutional or appellee has exceeded his statutory authority. It is not a party to the litigation and certainly a judgment here would in nowise affect the United States or adjudicate its interests, which is the test: *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902). Even governmental immunity is not favored and there is no presumption that an agent is immune—*Reconstruction Finance Corporation*

v. *J. G. Meehan Corp.*, 312 U. S. 81 (1941). The mere fact that the funds necessary for the payment of a judgment come out of the Treasury of the United States is no answer—*Sloan Shipyards Corp.* v. *United States Shipping Board, etc.*, 258 U. S. 549 (1922); *Commonwealth Finance Corp.* v. *Landis*, 261 Fed. 440 (D. C. Pa.) (1919).

Just how an order which enjoined appellee from enforcing his illegal unilateral order or adjudging it to be void would in any manner or way compel the United States to pay appellant is not clear. True, an order may remove an illegal impediment to payment for goods sold and delivered by appellant to the United States and for which it has already promised to pay and for which vouchers have already been issued. The Renegotiation Act assumes that the United States has agreed to pay because appellee is directed by it (Sec. 403 (c)(2)), to withhold "amounts otherwise due" to appellant. If there is any defense to payment for these goods, certainly nothing which occurs in this case will affect that defense. It is clear there is no defense because vouchers authorizing payment have been issued (R. 27-28, 44-46, 48-49). We take it that nobody will seriously urge that if appellee were to be enjoined from carrying out his unilateral order by withholding or seizing amounts otherwise due from appellant's contractors (R. 6) that such a judgment would in effect be one against these contractors, or that it would produce one cent for appellant from these contractors. We fail to see any real distinction between money due appellant from the United States and that due it from its contractors. If appellee's unilateral order (R. 5-6) is illegal, then he is a trespasser if he attempts to seize appellant's property without regard to where it may be found. It strikes us as a rather shocking idea that although appellee may be a trespasser, he acquires immunity from his illegal acts by confining his trespass to appellant's unpaid vouchers, but payable to it, even though

the funds therefor come from the Treasury of the United States. This is not the law because the courts have denied immunity when alleged trespasses involved real and personal property owned by the United States as well as attempts to allegedly unlawfully interfere with the payment of funds from the Treasury of the United States: *Smith v. Jackson*, 246 U. S. 388 (1918), affirming 241 Fed. 747; *Miguel* v. *McCarl*, 291 U. S. 442; *Magruder* v. *Water Users' Association* (C. C. A. 8th) 219 Fed. 72 at 78 (1914); *R. F. & P. R. Co.* v. *McCarl* (App. D. C.) 62 F. (2d) 203 (1932), Cert. Den. 288 U. S. 615 (1933); *Miller* v. *Standard Nut Margarine Co. of Florida*, 49 F. (2d) 85 (C. C. A. 5th) (1931); Affirmed 284 U. S. 498 (1932); *Wells* v. *Nickles*, 104 U. S. 444 (1882); *United States* v. *Lee*, 106 U. S. 196; *Work* v. *Louisiana*, 269 U. S. 250 (1925); *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 (1943). In the last cited case, this Court said at p. 584:

> "If he (government officer) is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law which exonerates him."

If the contention that this is a suit against the United States to which it has not consented, be sound, then as to the amount which appellee threatens to withhold, it has not consented to be sued in any forum and the result is that appellee may illegally deprive appellant of its property and appellant is helpless to prevent such deprivation. If this be so, there are no constitutional limitations because there is no way of testing the constitutionality of appellee's illegal action: *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 37 Fed. Supp. 93, 95 (1941), Affirmed 313 U. S. 508 (1941); *Hammond-Knowlton* v. *United States*, 121 F. (2d) 192 (1941); Cert. Den. 314 U. S. 694. To accept the contention that this suit in effect compels the United States to specifically perform its contracts to pay for material sold and delivered to it by appellant, necessarily

assumes, we submit, that the United States will refuse to pay, an assumption which is not in accordance with good faith in meeting public obligations. The fact is, the United States has already, in effect paid, because vouchers have been issued to appellant's order and are being held as security (R. 17-18, 27-28, 44-46, 48-49). All that remains to be done, as we understand the situation, is a ministerial Act, namely, to have a disbursing officer of the Department issue checks in payment of the approved vouchers, which are authority for the issuance of the checks (R. 45-46). The vouchers belong to appellant and must be delivered to it if appellant is eventually successful in this litigation: The stipulation so contemplates.

The language of Mr. Justice Miller in *United States* v. *Lee*, 106 U. S. 196, is of great significance here. In that case, which was an action in ejectment to recover the possession of property from officers of the United States, whose defense was that they had no personal interest in the property, but were holding it for the United States, this Court, after a review of numerous cases, said at p. 219 et seq.:

> "The position assumed here is that, however clear his [a citizen] rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question.
>
> "But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?
>
> "In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a *case* within the meaning of that term, as employed in the Constitution and

defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery."

And at p. 220:

"Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

There are numerous cases illustrating the point and demonstrating the fallacy of the reasoning of the Court below. One need only examine the cases analyzed in *United States* v. *Lee, supra*; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Tindal* v. *Wesley*, 167 U. S. 204; *Ex Parte Young*, 209 U. S. 123; *Smith* v. *Jackson*, 246 U. S. 388 (affirming 241 Fed. 747); *Miguel* v. *McCarl*, 291 U. S. 442 and *Perkins* v. *Elg*, 307 U. S. 325 (1939), to ascertain that enjoining illegal action under an unconstitutional statute or action beyond statutory authority is not the equivalent of requiring affirmative action nor does it amount to a suit against the sovereign. A case in point is that of *Nece* v. *Morgan Co.* (C. C. A. 8th), 106 F. (2d) 746 (1939), where the Court enjoined the defendant from making an unlawful charge against money due from the United States. To the same effect is *Berger* v. *Ohlson* (C. C. A. 9th), 120 F. (2d) 56 (1941); *Magruder* v. *Water Users' Association* (C. C. A. 8th), 219 Fed. 72, and *Goldman* v. *American Dealers Service, Inc.* (C. C. A. 2d), 135 F. (2d) 398 (1943).

III

The Complaint States a Cause of Action in Equity and Grounds for a Declaratory Judgment

Whether this objection is open to appellee is questionable. The ground under which this objection will apparently be urged is that the Court was without jurisdiction over the subject matter of the action (R. 44). Jurisdiction being the power to decide surely the Court has power to decide whether there is jurisdiction in equity—*Sperry Gyroscope Company* v. *Arma Engineering Company*, 271 U. S. 232 (1926); *Douglas* v. *Jeannette*, 319 U. S. 157 (1943).

There is no longer any distinction procedurally between law and equity: *Grauman* v. *City Company of New York*, 31 Fed. Supp. 172 (D. C. N. Y.) (1939), and hence the

question here is not, we believe, whether there was jurisdiction in equity, but whether the facts averred in the complaint disclose any grounds for sustaining the jurisdiction of the lower Court. In this connection it is important to bear in mind that the complaint contains a prayer for declaratory judgment relief (R. 16-17), which is not only proper, but on the basis of the facts averred, established the right to such relief: 28 U. S. C. 400; Federal Rules of Civil Procedure, Rule 57; *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249 (1933) and *Aetna Ins. Co.* v. *Haworth*, 300 U. S. 227. In *Waterman Steamship Company* v. *Emory S. Land* (App. D. C.) (decided June 18, 1945 and not officially reported) the Court, in a case involving the Renegotiation Act of 1942 held that declaratory judgment relief was proper.

That equity is the proper jurisdiction for injunctive relief where a proceeding is against an individual defendant who is allegedly acting under an unconstitutional statute or beyond his statutory authority, if irreparable injury is shown, is settled by numerous cases in this Court, *inter alia*, *Stark* v. *Wickard*, 321 U. S. 288 (1944); *Goltra* v. *Weeks*, 271 U. S. 536 (1926); *Colorado* v. *Toll*, 268 U. S. 228 (1925); *Ex Parte Young*, 209 U. S. 123.

We also urge the Court to note that under the prayer for a declaratory judgment (R. 16-17), irreparable injury and an adequate remedy elsewhere are immaterial: *N. C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *Doehler Metal Furniture Co.* v. *Warren* (App. D. C.), 129 F. (2d) 43 (1942) (cert. denied 317 U. S. 663); *Delno* v. *Market St. Rwy. Co.* (C. C. A. 9th), 124 F. (2d) 965 (1942).

If appellee is permitted to withhold the amounts otherwise due appellant from the United States and appellants' contractors, he will, under the statute (Section 403(c) (2) (v)), be obliged to turn such amounts into the Treasury of the United States as miscellaneous receipts and thereby render it impossible for appellant to recover

them as the statute does not provide for suit against the United States. When the complaint was filed neither a refund nor interest were recoverable. These considerations establish irreparable injury and sustain jurisdiction in equity: *Ohio Oil Co.* v. *Conway*, 279 U. S. 813 (1929); *Fox* v. *Standard Oil Company*, 294 U. S. 87 (1935); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Gully* v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 (cert. den. 298 U. S. 688) (1936); *Educational Films Corp. of America* v. *Ward*, 282 U. S. 379 (1931); *United States* v. *Goltra*, 312 U. S. 203 (1941).

The complaint also alleges that (R. 9-11) contracts were included which are not within the statute and this sustains equity jurisdiction: *Waite* v. *Macy*, 246 U. S. 606 (1918); *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932).

The complaint alleged (par 34; R. 15) appellant would be obliged to bring a multiplicity of costly and vexatious suits against numerous of its customers scattered through out the United States and that appellee's threatened actions, i. e., threat to cause appellant's customers to withhold payment on their contracts would seriously interfere with the business relations between appellant and its customers to its serious financial disadvantage. These allegations are to be taken as true: *Polk Co.* v. *Glover*, 305 U. S. 5 (1938); *Utah Fuel Company* v. *National Bituminous Coal Commission*, 306 U. S. 56 (1938); *Gibbs* v. *Buck*, 307 U. S. 66 (1939). And sustain equity jurisdiction.—*Wilson* v. *Illinois Southern Railway*, 263 U. S. 574 (1924); *Allen* v. *Regents*, 304 U. S. 439 (1938); In *Petroleum Exploration Company* v. *Public Service Commission*, 304 U. S. 209 this Court said at 217—"For determination of the adequacy of this remedy [plain, adequate and complete remedy at law] we must here assume the allegations of appellant that unless an injunction is granted, irreparable

injury will flow from its compliance with the order of May 29."

At the time the complaint was filed, appellee had threatened to not only withhold amounts otherwise due appellant from the United States, but as well, amounts due it from its numerous contractors (R. 5-6). It is well settled law that jurisdiction is determined by the facts as they exist when the complaint is filed: *Camp* v. *Boyll*, 229 U. S. 530 (1913); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920); *Consolidation Coal Company* v. *Railway Co.* (D. C. Md.) 44 F. (2d) 595 at 596 (1930). The belated attempt by the appellee to defeat jurisdiction by changing his mind and stating that he would look only to the pledged vouchers months after the complaint was filed (R. 28, 34, 45-46, 49), is of course of no legal consequence because, as was well said by Lord Justice James in *Morley* v. *White*, L. R. 8 Chancery App. Cases 734:

> "I know of no authority or principle by which it can be established that, when this court has been properly applied to because there was no adequate remedy at law, the defendant can afterwards put in a plea in the nature of puis darrein continuance, to the effect that, since he put in his answer to the original bill, he has removed the obstacle which prevented the plaintiff from suing at law. It would be a monstrous result, if, after a plaintiff had rightly commenced proceedings in this court, a defendant could say: 'I have but now removed the legal difficulty. Be good enough to dismiss your bill and sue me at law.'"

The evident purpose of the stipulation was to preserve the status quo as of the date of the stipulation. The stipulation was in lieu of injunctive relief and nothing either party to the stipulation did thereafter could be or in fact, has, altered the then-existing rights of the parties to the litigation (par. 2-3, R. 18). The appellant posted

security, i.e., its Government vouchers, to assure payment of any liability which it was ultimately determined by a Court of last resort to owe (par. 1, R. 17). The appellee was then assured of payment if it was finally determined there was liability. His hands from that point were effectually tied. *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1 (1936). Of course, appellee had no need to look any further for payment than the pledged funds. If an injunction bond had been given, he would have looked to it. The legal situation as the result of the stipulation is the same.

IV

The Tax Court

In view of *Rickert Rice Mills* v. *Fontenot*, 279 U. S. 110 (rehearing denied 297 U. S. 726), and the assumption of unconstitutionality, it seems unnecessary to pursue the Tax Court aspect of this case any further. We also suggest that if proceedings in the Tax Court be considered mandatory then the question of the constitutionality of the statute in this respect, is raised by appellant and this question may not be argued here, under the order of this Court.

As a matter of precaution, we suggest that the basis for the rule of the exhaustion of administrative remedies is that it is necessary to afford the administrative body an opportunity of exhausting the administrative process on administrative questions before resort is had to a Court. Where there is nothing upon which the administrative process can act, certainly there is no reason for requiring a futile resort to an additional administrative body: *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); *Turner D. & L. Lumber Co.* v. *C. M. & St. P. Railway Co.*, 271 U. S. 259 (1926); *Gully* v. *Interstate Natural Gas Co.* (C. C. A. 5th) 82 F. (2d) 145 (1936) (Cert.

denied, 298 U. S. 688 (1936); 8 Fed. Supp. 174 (1934). There is nothing in this case upon which the Tax Court may act. If there is no liability there is no need to go to the Tax Court. We repeat that what we seek is to prevent this individual appellee from carrying out his illegal order and threat, which was promulgated by him, we respectfully insist, under an unconstitutional statute and in excess of his statutory authority. This is an individual wrong. *Sterling* v. *Constantin*, 287 U. S. 378. The only questions here are judicial ones and these are for the courts: *Brown & Sons Lumber Co.* v. *Louisville & R. Co.*, 299 U. S. 393 (1937). The order of the appellee cannot be collaterally attacked: *Ingham* v. *Union Stock Yards Co.* (C. C. A. 8th) 64 F. (2d) 390 (1933).

The jurisdiction of the Tax Court is definitely restricted by the statute "* * * to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor and such determination shall not be reviewed by any court or agency." (Section 403(e)(1).)

Here is a plain definition of the limited authority of the Tax Court to consider nothing but a fact question—the amount of excessive profits if the contractor desires such further determination. It completely negatives any grant of judicial authority and this, no doubt, for the reason that the Tax Court is neither a judicial or a quasi-judicial body, but a mere executive agency.

It should also be noted that there is no right of appeal in the renegotiation statute, and certainly the present statutory provisions for review in tax matters are not applicable here.

The Tax Court is a creature of Congress, an executive or administrative agency (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716 (1929)), and cannot have any

greater powers than its creator. The statute creating it provides that it is "an independent agency in the executive branch of the Government"—26 U. S. C. ~~1212~~ 1288. This Court so regards it: *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1926); *Blair* v. *Osterlein Machine Co.*, 275 U. S. 220 (1927). In his concurring opinion in *Bingham's Trust* v. *Commissioner of Internal Revenue*, 325 U. S. — (decided June 4, 1945), Mr. Justice Frankfurter aptly defined the powers of the Tax Court as follows:

> "On the other hand, constitutional adjudications, determination of local law questions and common law rules of property, such as the meaning of 'a general power of appointment' or the application of the rule against perpetuities, are outside the special province of the Tax Court."

The Tax Court being a creature of Congress could not deny the authority of its creator. It would have to assume the constitutionality of the statute: *Buder* v. *First National Bank*, 16 F. (2d) 990 (C. C. A. 8th) (1927) (Cert. denied, 274 U. S. 743 (1927); *Engineers Public Service Co.* v. *Securities & Exchange Comm.* (App. D. C.), 138 F. (2d) 936, 952 (1943) (Cert. granted 322 U. S. 723 (1944));

The prime function of an administrative agency, as an arm of the legislature, is to determine the factual matter within the legislative province. What Congress cannot constitutionally do, its creature cannot do. The Tax Court cannot correct the wrong alleged here. There is no delegation, in this statute, of authority to the Tax Court to pass on legal or constitutional questions and, under the facts here involved, Congress, it is submitted, could not delegate such authority. For example, we insist that Congress cannot constitutionally reach contracts entered into prior to the date of the statute and that it cannot authorize repudiation of prior contracts and give executive officers

the unrestricted privilege of determining what is just compensation. Can the Tax Court determine these legal questions, and is such a determination not to be reviewed by any Court? Can the Tax Court determine whether a contract is divisible and in part not subject to the statute or will it have to take the statute as it is written? These are questions going to the power of Congress and to the jurisdiction of its creature which, we submit, are constitutionally beyond the power of Congress. They and similar questions are for a court to determine. If the Tax Court has the right to determine these questions, it is acting judicially and not administratively, and this Court is likewise entitled to determine them in this proceeding: *City Bank* v. *Schnader*, 291 U. S. 24 (1934); *F. T. C.* v. *Curtis Pub. Co.*, 260 U. S. 568 (1923).

We are not asking the Court to substitute its judgment on any matter to be passed upon by the administrative agency—The Tax Court: *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557 (1919); *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); and *Turner D. & L. Lumber Co.* v. *C., M. & St. P. R. Co.*, 271 U. S. 259 (1926). We respectfully insist that the matters involved in the complaint were beyond the powers of Congress and the appellee, because Congress has acted unconstitutionally.

In *Buder* v. *First National Bank*, 16 F. (2d) 990 cert. denied 274 U. S. 743, the Court said at p. 992:

> "The defendants also contend that there was available to the plaintiffs a remedy through the administrative tax boards of Missouri, and that, not having sought that remedy, they cannot maintain this suit (citing cases). In those cases, however, the complainants were of invalid assessments under existing laws. Here the complaint is of an assesment under no law at all.
>
> "In *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000, in which it was held that a

suit in equity would lie to enjoin the exaction of the illegal or unconstitutional excess of a tax, it was said, relative to administrative remedies:

"'To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property.'

"Here, if there was no law, there was no jurisdiction to assess the shares of stock. There could be nothing more futile than an application for administrative relief in a case of this kind. If section 12775 was in force, the tax was properly assessed; if it was not in force, there was no such tax. No administrative officer or board of Missouri could do otherwise than assume the validity of the law under the circumstances, and there was, as a matter of fact, no administrative remedy."

In *Gully* v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 cert. nied 298 U. S. 688, where it appeared that a claim for a x exemption would be denied, the statute providing for an peal with supersedeas, the Court said there was no neces- y for appeal to a Court as provided by the State statute. he Court below also pointed out there was no certainty as the administrative remedy or of a refund: 8 Fed. Supp. 4, 175.

In the case at bar, the sole questions before the Court are es of law—constitutional and constitutional application the statute—questions over which the Tax Court, an dministrative body, has no jurisdiction. As was well said *Federal Radio Comm.* v. *Nelson Bros. B. & M. Co.*, 289 S. 266, at 277 (1933):

"If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding."

Another question arises—would appellant, by going to the Tax Court, i. e., invoking the statute, deprive itself of the right to insist upon its constitutional rights? Whether right or wrong, the Tax Court in *Cappellini* v. *Commissioner*, 14 B. T. A. 1269, so held. This Court recognized this defect in *Ex parte Fassett*, 142 U. S. 479 and *De Lima* v. *Bidwell*, 182 U. S. 1 (1901). Again if appellant had gone to the Tax Court it might be held to have made an election of forums—*Standard Oil Co.* v. *United States*, 283 U. S. 235. Surely all this uncertainty demonstrates that appellant is in the proper Court for the determination of its constitutional rights.—*Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282 (1916).

The appellee has unilaterally determined, illegally we say, that appellant should refund $1,014,873.78 (R. 49), and appellant insists that, under the Constitution, appellee had no right to make such a determination—as a matter of law. In other words, if appellant fails in its legal contentions, it loses the $1,014,873.78. There is no factual situation in this case upon which the administrative process can act: *Southern Blvd. R. Co.* v. *City of New York*, 86 F. (2d) 633 (C. C. A. 2nd, 1936) (Cert. Denied, 301 U. S. 703 (1937)), nor are there any mixed questions of law and fact. Whether a contract is within the statute is purely a question of interpretation of the contract and the statute, just as the interpretation of the tariff was the question in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. See also *I. C. C.* v. *Steamship Co.*, 224 U. S. 474 (1912); *C. M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 (1890).

The Tax Court is an option or a privilege afforded those against whom a unilateral determination is entered for a *de novo* proceeding as to amount only. The statute provides (Sec. 403(e)(2)) that appellant "may" file a petition with the Tax Court and upon such filing the Tax Court shall have exclusive jurisdiction. If Congress had intended

exclusive jurisdiction in a case of this nature, it could very easily have used "shall". The obvious danger of making a further proceeding in the Tax Court mandatory was that it would have made the statute unconstitutional from a procedural standpoint because judicial review is forbidden. The learned Assistant Attorney General pointed out this deficiency to the Senate Committee (Hearings Before Senate Finance Committee 78th Congress on H. R. 3687, pp. 1036-1037). This is the plain meaning of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), and *Crowell* v. *Benson*, 285 U. S. 22 (1932) (see 80 U. Pa. L. Rev. 1055). See also *Engineers Public Service Co.* v. *Securities & Exchange Comm.*, 138 F. (2d) 936 (cert. granted 322 U. S. 723). It is also to be noted that in the case of an order entered by the War Contracts Price Adjustment Board, which has been created by the 1944 amendments, the statute expressly provides that if that board issues an order then, if a petition is not filed in the Tax Court, the order of the Board shall be final (Sec. 403(c)(1)), but it is to be noted that where, as here, a unilateral order has been entered by the Secretary, the statute does not give an exclusive jurisdiction to the Tax Court without qualification. It simply provides an option to the party against whom the unilateral order is entered to go to the Tax Court, and, if a petition is filed in the Tax Court, then the Tax Court has exclusive jurisdiction over such matters as are committed to it by the statute, namely, the determination of the amount of the excessive profits received or accrued by the contractor, and this according to its uncontrolled opinion.

The proceeding before the Tax Court may take years to finally determine with no right of judicial review. In fact, the statute plainly provides (Sec. 403(e)(1)), that the "determination" of the Tax Court "shall not be reviewed or redetermined by any court or agency." In the meantime,

the statute plainly provides that there shall be no stay of the unilateral order (Section 403(e)) and there is no certainty of a refund in the event of a favorable determination by the Tax Court. These considerations sustain equity jurisdiction: (1936); *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924); *Champlain Ref. Co.* v. *Corporation Com.*, 286 U. S. 210 (1932); *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300 (1937); *St. L. & S. F. Ry. Co.* v. *Alabama Public Service Commission*, 279 U. S. 560 (1929); *Porter* v. *Investors' Syndicate*, 286 U. S. 461 (1932); *Ohio Oil Co.* v. *Conway*, 279 U. S. 813.

In *Stark* v. *Wickard*, 321 U. S. 288 (1944) (Below 136 F. (2d) 786) (1943), where an injunction was sought to prevent the Secretary of Agriculture from illegally diverting funds of the plaintiffs, this Court said at p. 290:

> "The district court for the District of Columbia has a general equity jurisdiction authorizing it to hear the suit; but in order to recover, the petitioners must go further and show that the act of the secretary amounts to an interference with some legal right of theirs. If so, the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy will enable the petitioners to maintain their suit; but if the complaint does not rest upon a claim of which courts take cognizance, then it was properly dismissed."

And again at p. 310:

> "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf. United States v. Morgan, 307 U. S. 183, 190, 191, 83 L. ed. 1211, 1216, 1217, 59 S. Ct. 795. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and

the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article 3, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administraitve power."

Conclusion

In conclusion, we respectfully submit that for the reasons heretofore given, the order of the lower Court should be reversed and the case proceeded with on the basis of the law as announced in *Polk Co.* v. *Glover,* 305 U. S. 5, where this Court said at p. 10:

> "The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. * * * And that determination requires a hearing in due course upon the issues raised by the pleadings."

This was the attitude of the three-Judge Court (Justices Groner, Bailey and Goldsborough) in *Lincoln Electric Company* v. *Knox,* 56 Fed. Supp. 308, a case substantially the same on its facts as the case at bar. There the Court said at page 310:

> "Defendants insist that, notwithstanding this and granting also that the Act of Congress is unconstitutional, plaintiff has no other recourse than to challenge the claimed right of the Government in the Tax Court or in the Court of Claims.
>
> "We think this is not sufficient. In our opinion the case should be tried on the merits and plaintiff given

the opportunity of proving its case, and the question of the constitutionality of the Act of Congress should be briefed and argued. The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts, without an adequate and proper hearing. If the Renegotiation Act is in all respects valid, obviously, plaintiff has no case. If, on the other hand, it is invalid, and the Government, as we have indicated, is not an essential party, then, clearly, plaintiff ought not to be stopped at the threshold of the court and told to seek relief in some other court and in some other manner obviously inadequate and incomplete."

Respectfully submitted,

W. Denning Stewart,
Howard Zacharias,
Mahlon E. Lewis,
Charles Effinger Smoot,
Counsel for Appellant.

APPENDIX A

The 1942 Renegotiation Act as Amended

Sec. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or • • •

(omitted portions refer to so-called "war brokers")

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000, hereafter made by such department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract described in subsection (a) (5) (ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a) (5) (i) made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct; and (iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such ex-

cessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) • • •

(Omitted portion refers to recognition of deductions, credits, etc.)

(4) • • •

(Omitted portion refers to agreements.)

(5) • • •

(Omitted portion relates to filing of information, time for commencement of renegotiations, etc.)

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made, and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403; or (iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i) and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii)) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the

fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) • • •

(Omitted portion provides for Secretary obtaining information.)

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that De-

partment, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

(i) (1) the provisions of this section shall not apply to— * * *

(Omitted portion provides for exemptions.)

(j) * * *

(Omitted portion provides exemptions to permit intermittent and temporary employees to prosecute claims against the United States.)

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

(Section 403 of the Act of April 28, 1942, the Sixth Supplemental National Defense Appropriation Act, 1942, as amended October 21, 1942, July 1, 1943 and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Tile 50, Appendix 1191). Note: The Acts approved October 21, 1942, and July 14, 1943, specifically provide that the amendments made to section 403 by those Acts shall be effective as of April 28, 1942, the date of the approval of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.)

The 1943 Renegotiation Act

Sec. 403(a) (4) (C) and (D)

* * * * * * * *

(Omitted portions relate to allowances of costs and rebates.)

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor, or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under

this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Sec. 403 (i) (1) (C), (D), and (F).

* * * * * * * *

(Omitted portions relate to exemptions.)

Sec. 403 (i) (3).

* * * * * * * *

(Omitted portions relate to natural resources and increments in the value of excess inventories.)

ec. 403 (1). This section may be cited as the "Rene-
iation Act."

Section 403 of the Sixth Supplemental National De-
se Appropriation Act, 1942, as amended by Section
(b) of the Act of February 25, 1944 (58 Stat. 78-92)
l which according to subsection (d) of said section 701
ll be "effective as if such amendments and subsections
l been a part of section 403 of such Act on the date of
enactment"—April 28, 1942. This so-called 1943 Re-
gotiation Act—without the so-called 1942 Renegotiation
t—may be found in Title 50 of the United States Code
notated Appendix, Section 1191, 1944 cumulative an-
al Pocket Part.)